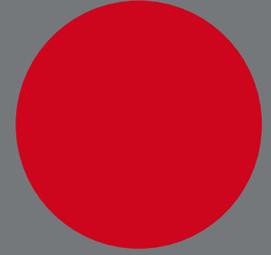


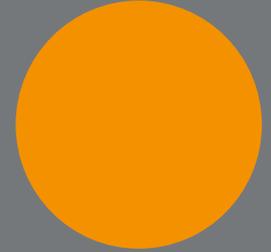
Commercially connected
August 2020



Impact



Immediate



Impact in the near future



On the horizon

Introduction

Welcome to the Eversheds Sutherland monthly commercial law update, covering both case law and regulatory development. *This report is intended to give you a general overview of legal developments in certain areas. It is provided for information purposes only and is not intended to be comprehensive or to constitute advice on which you may rely.*

Click on your topic of interest below

Focus on
Coronavirus

Brexit

Commercial -
general

Consumer

Cyber security

Data protection
and privacy

Technology

Development	Summary	Supporting information	Impact
Eversheds Sutherland updates	For COVID-19 legal advice and updates, please visit the Eversheds Sutherland coronavirus hub. See also this link for an Eversheds Sutherland global return to work survey report.	Coronavirus legal hub	
New COVID-19 regulations	<p>August saw a variety of regulations issued to deal with the pandemic, some introducing restrictions whilst others permitting an easing of lockdown measures. For example, there were regulations extending the requirement to wear face coverings but also allowing more venues to reopen in England (such as conference centres). Differences between England, Scotland and Wales remain: for example, Scotland has introduced a legal requirement for hospitality premises to collect, retain and share when requested customer data for the purposes of preventing and monitoring the spread of COVID-19. This means that for data protection purposes, controllers in Scotland could consider the lawful basis for processing to be necessary for compliance with a legal obligation rather than legitimate interests. England currently does not have a legal requirement for controllers to collect and retain this data. Wales has a similar legal requirement for specified open premises.</p> <p>In respect of the regulations relating to face coverings, new places where these must be worn include public areas in hotels, concert and other public halls, cinemas, museums and galleries and certain premises are no longer exempt from the definition of “shops”, so that face covering must be worn in premises providing professional, legal or financial services. In Scotland the rules are slightly different, including that a face shield is no longer considered an adequate form of face covering.</p>	Government page setting out all UK Coronavirus legislation Government guidance on face coverings	
Government guidance on self-isolation in the employment context	The UK Government has issued new guidance for employees required to self-isolate for 14 days after returning to the UK in the context of working from home or taking leave if this is not possible. The guidance covers the position of employers as well in terms of	Guidance	



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
	treatment of self-isolating employees where this prevents the employee from working.		
Development	Summary	Supporting information	Impact
Eversheds Sutherland updates	For Brexit business and legal advice, visit the Eversheds Sutherland Brexit hub.	Brexit hub	
Progress on UK-EU negotiations	<p>The seventh round of negotiations has now finished but with continued deadlock on the same core issues. The UK has issued a draft legal text for the future relationship but the EU refuses to comment on this until agreement has been reached on the core issues. M. Barnier warned that 'at this stage, an agreement between the United Kingdom and the European Union seems unlikely', although of course concessions by either or both sides will change this position.</p> <p>In terms of key dates, the EU's position is that an agreement must be reached by October 2020 at the latest in order to ratify and implement the new treaty entering into force on 1 January 2021. The remaining rounds of negotiation are:</p> <ul style="list-style-type: none"> • round eight: week commencing 7 September 2020. • meetings of the chief negotiators and specialised sessions (as necessary): weeks commencing 14 and 21 September 2020. • round nine: week commencing 28 September 2020. 	UK draft legal text for a comprehensive free trade agreement	
EU proposal on Union tariff rate quotas and other import quotas	The European Commission has adopted a proposal for a Regulation on the application of Union tariff rate quotas and other import quotas which relates to the position of Northern Ireland. As a reminder, under the Northern Ireland Protocol in the Withdrawal Agreement, Northern Ireland is part of the UK's customs territory, and the UK can include Northern Ireland in the territorial scope of its World Trade Organisation schedules. However, the Protocol also	Proposed regulation	



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
	<p>provides that references to the EU's customs territory must be read as including the land territory of Northern Ireland. As this could allow for EU quotas to be circumvented, this proposed Regulation provides that the EU's tariff rate quotas and other import quotas should be available only for goods imported and released into free circulation in the EU and not in Northern Ireland. Once adopted, the Regulation would apply from 1 January 2021.</p>		
<p>Moving goods to and from Northern Ireland</p>	<p>The Cabinet Office has published a series of policy papers providing guidance on customs processes for moving goods between Northern Ireland and Great Britain, the EU and the rest of the world (non-UK and non-EU) that take effect at the end of the transitional period. The papers refer to future guidance and consultations and therefore not a complete picture of the rules for trade that are subject to the Northern Ireland Protocol.</p> <p>The UK Government states that it is guaranteeing "unfettered access" to the Great Britain market, meaning that, subject to limited exceptions, goods moving from Northern Ireland to Great Britain will not require import declarations or entry summary ("safety and security") declarations and will not be subject to tariffs, customs checks or new regulatory checks. The Government's position is that export or exit summary declarations for goods moving to Great Britain should not be required, but this requires EU agreement.</p> <p>Goods moving from Great Britain to Northern Ireland will require new customs processes, such as electronic import declarations and safety and security information, to ensure no tariffs are paid on goods destined for Northern Ireland and any tariffs for goods destined for the EU are paid. The UK Government wants to keep administration to a minimum and, in furtherance of this, has announced the Trader Support Service for Northern Ireland businesses. This service can submit import and security and safety declarations on a business's behalf.</p>	<p>Policy papers</p>	
<p>UK Government proposals on environmental targets post Brexit</p>	<p>The Department for Environment Food and Rural Affairs has published a policy paper that provides an overview of how the UK Government will set long-term, legally-binding environmental targets required under the Environment Bill 2019-21 by October 2022.</p>	<p>Policy paper</p>	



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
Enforcement of intellectual property rights	<p>The European Commission has published an updated notice to stakeholders on the effect of Brexit on customs enforcement of intellectual property rights, which explains that from the end of the transition period:</p> <ul style="list-style-type: none"> • it will no longer be possible to submit requests to UK customs authorities to take action in relation to allegedly infringing goods. Any such applications that are submitted before the end of the transition period in any EU member state other than the UK, but which ask the UK customs authorities (among others) to take action, will no longer apply in the UK • UK customs decisions on requests submitted under EU regulations will no longer be valid. Holders of these decisions will have to submit a new request to an EU member state to get a decision there. • decisions given by any EU member state other than the UK before the end of the transition period will remain valid in the relevant EU countries even if they covered the UK. <p>The position is different for Northern Ireland in certain respects so that:</p> <ul style="list-style-type: none"> • UK customs decisions made in respect of Northern Ireland will not apply in the EU, but will be valid in Northern Ireland in relation to any EU intellectual property rights relied on • a decision made in an EU member state may include Northern Ireland in relation to EU intellectual property rights after the transition period. 	Notice to stakeholders	
Brexit statutory instruments to take effect from 31 December 2020	<p>The most significant of these published in August in relation to commercial practice are:</p> <ul style="list-style-type: none"> • the Product Safety and Metrology (Amendment) (EU Exit) Regulations 2020 • Product Safety and Metrology etc. (EU Withdrawal and EEA EFTA Separation Agreements) (EU Exit) Regulations 2020 		



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
	<ul style="list-style-type: none"> the draft Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020 the Online Intermediation Services for Business Users (Amendment) (EU Exit) Regulations 2020 (relating to the Platform to Business Regulation which has applied in the UK and all EU member states since 12 July 2020. See our Commercial general section for more information on the EU Platform to Business Regulation and these UK amending regulations) 		

Main Menu



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
<p>New regulatory framework for online marketplaces, social media platforms and search engines</p>	<p>The EU Platform to Business Regulation is the EU’s regulatory framework to protect business users of online intermediation services and came into force last month on 12 July 2020. It regulates online intermediation services (such as online e-commerce marketplaces, app stores and social media services used by businesses) and search engines. The most significant elements on this framework are:</p> <ul style="list-style-type: none"> its scope in that it applies to all of the platforms referred to above which provide services to business users in the EU, irrespective of location of the platform it bans certain unfair practices it requires platforms to be more transparent about their ranking practices it requires platforms to set out an internal complaint handling procedure and offer formal mediation options. <p>As for Brexit, the Regulation applies directly in the UK and will become part of UK law at the end of transition. Last month the UK Government published a draft statutory instrument amending the Regulation so that it works on an operational basis post transition, but with the regulatory framework remaining substantively the same. Somewhat confusingly, in the UK the EU Regulation is referred to as the Online Intermediation Services Regulation.</p>	<p>Regulation</p> <p>UK Brexit statutory instrument: the Online Intermediation Services for Business Users (Amendment) (EU Exit) Regulations 2020</p>	
<p>Construing an obligation to follow market practice</p>	<p>In the case of CFH Clearing Ltd v Merrill Lynch International, the Court of Appeal considered whether the terms of a trading contract imported a contractual obligation to comply with what the appellant claimed to be ‘market practice’ so as to require the repricing of certain transactions. The context was that the transactions were governed by standard ISDA master documentation and, as one of the most important standard market agreement in the financial world, this was</p>	<p>Judgment</p>	



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
	<p>a deciding factor in the Court's decision that there was no importation of a market practice commitment into the arrangement, since this alleged variation had to be considered in the context of the parties' having adopted a detailed and generally accepted contractual regime.</p>		
<p>What can you take into account when withholding contractual consent?</p>	<p>The case of Apache North Sea Ltd v INEOS FPS Ltd, is at heart about construing consent clauses in commercial contracts where one party is restricted from withholding consent unreasonably. In this instance, when the party who had to give consent stated it would only consent if a certain condition was met, as that would mean that it party would receive a financial advantage to which it was not entitled under the terms of the contract, the court held that consent could not be made subject to such a condition, on the basis that this would either be unreasonable or not permitted by the actual wording of the contract.</p>	<p>Judgment</p>	
<p>Disclosing commission</p>	<p>In the case of Pengelly v Business Mortgage Finance 4 plc, the High Court decided that an undisclosed commission from lender to broker was a secret commission, with the result that this undisclosed commission could invalidate the mortgage between lender and borrower arranged by the broker. A general term in the mortgage stating that commission may be received was not sufficient to rescue the broker if it had not in fact disclosed the commission.</p>	<p>Judgment</p>	
<p>Facial recognition software and equality</p>	<p>In the Court of Appeal case of R v Chief Constable of South Wales and others, the use of automated facial recognition technology in a pilot project by the South Wales Police Force was not "in accordance with the law" on the basis that:</p> <ul style="list-style-type: none"> • there was no clear guidance on where the technology could be used and who could be put on a watchlist; • a data protection impact assessment was inadequate and not compliant with the Data Protection Act 2018; • the force had not taken reasonable steps to investigate whether the technology had a racial or gender bias, as required by the public sector equality duty. 	<p>Judgment</p>	



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
Two cases on restraint of trade	<p>There have been two recent cases on contracts alleged to be in restraint of trade and therefore unenforceable. In the first, Halal Meat Sellers Committee Ltd and another v HMC (UK) Ltd, the court held that a contract was not in restraint of trade where all that the defendant had done was to identify conditions of accreditation: a business (in this case a butcher) could sign up to the scheme (or not), and if they did so, they had to abide by the accreditation conditions. The choice to sign up to conditions of accreditation could not make the contract one in restraint of trade.</p> <p>The second case, Peninsula Securities Ltd v Dunnes Store (Bangor) Ltd, is more significant for assessing contractual restrictions against the doctrine of restraint of trade. This is a Supreme Court judgment which departed from what is known as the "pre-existing freedom" test of restraint of trade from an earlier 1968 case (the criteria for this earlier test being whether the restricted person was contracting to give up a right or freedom which it had previously had). The new approach advocated by this judgment is whether the restrictive covenants in question have become part of the accepted machinery of a type of transaction which is generally considered acceptable and necessary, described as a new "trading society" test: in this case, restrictive covenants in favour of anchor tenants in commercial leases were in the Supreme Court's view accepted and normal. The crux will be trying to assess what other transactional situations and their restrictions come within "general commercial acceptance".</p>	Halal Meat Sellers judgment Peninsula Securities judgment	
Product liability and non-disclosure clauses	The Office for Product Safety and Standards has published guidance for businesses on how to use non-disclosure clauses appropriately in compensation settlement agreements where there has been a product safety issue.	Guidance	

Main Menu



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
Consultation on consumer rights on supplier insolvency	<p>The Law Commission is consulting on a draft Bill to update and enhance consumers' rights when a supplier becomes insolvent in England and Wales, including proposals dealing with contract formation online. The proposed changes aim to provide clarity for consumers about when they will own goods they have pre-paid for when the retailer from whom they bought the goods becomes insolvent.</p> <p>The Law Commission's view is that particularly with online sales, retailers tend to seek to delay formation of the contract until the goods are sent, or in some cases delivered, to the consumer: their proposal is to amend the Consumer Rights Act 2015 via their proposed Bill so that it is clear what events and circumstances are sufficient to transfer ownership to the consumer, even if contract formation is delayed until after payment.</p> <p>Consultation ends on 31 October 2020. Following the consultation, the Law Commission will finalise the text of the draft Bill, which it will publish in a report. After that BEIS will decide if it wishes to implement the draft Bill.</p>	Consultation	
Transparency in consumer enforcement cases	<p>The Competition and Markets Authority is seeking views on a draft updated Supplementary Note which proposes that it should become the norm for the CMA to publicly name the parties it is investigating for consumer law breaches, at the same time that it announces the investigation itself. Consultation closes on 10 September 2020.</p>	Consultation	

Main Menu



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
Interpol issues report on cybercrime activity during COVID-19 pandemic	Interpol has issued a report which analyses the shift in cybercrime activity during the current COVID-19 pandemic. The report highlights that cybercriminals have turned their attention away from individuals and small businesses and are instead now focusing on large international organisations and governments as more individuals work from home.	Press release Report	
Council of Europe announces first sanctions against cyberattack	<p>The Council of the European Union has announced its first ever sanctions against cyberattacks in Council Decision (CFSP) 2020/1127. The Council has imposed restrictive measures against six individuals and three entities responsible for a number of cyberattacks including those publicly known as 'WannaCry', 'NotPetya', and 'Operation Cloud Hopper'. The measures include a travel ban, an asset freeze and a further restriction preventing EU citizens and entities from making funds available to sanctioned entities and individuals.</p> <p>The Council's powers to impose sanctions fall under the Framework for a Joint EU Diplomatic Response to Malicious Cyber Activities adopted in May 2019. The framework allows the EU and its member states to use all Common Foreign and Security Policy measures, including restrictive measures if necessary, to prevent, discourage, deter and respond to malicious cyber activities targeting the integrity and security of the EU and its member states.</p> <p>UK Foreign Secretary, Dominic Raab, welcomed the Council Decision and stated that the UK will continue to implement its own Cyber Sanctions regime which will allow the UK Foreign Office to impose travel bans and asset freezes on both individuals and organisations from the end of the Brexit transition period.</p>	Press release Decision	

Main Menu



Immediate impact



Impact in the near future



On the horizon



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
EU and US issue joint statement on new Privacy Shield framework	The European Commission and the US Department of Commerce have issued a joint statement confirming that they have commenced discussions to establish a new EU-US Privacy Shield framework to comply with the Schrems II decision. Both parties acknowledge the importance of data protection in transatlantic transfers of data and have a shared commitment to secure fundamental rights and uphold the rule of law.	Joint statement - Commission Joint statement - US	
ICO updates resources for organisations in readiness for the end of the Brexit transition period	<p>The ICO has updated its resources for organisations in readiness for the end of the Brexit transition period. The resources have a particular focus on how to prepare if there is no adequacy decision in respect of the UK at the end of the transition period and they include specific guidance for:</p> <ul style="list-style-type: none"> • large businesses and organisations and data protection specialists; • SMEs; and • police forces and other law enforcement authorities. <p>These specific guidance notes are also supplemented by a Frequency Asked Questions note which provides more general guidance on the impact of the end of the transition period on data protection.</p>	ICO resources	
ICO issues guidance on AI and data protection	See our Technology section for a summary of ICO guidance on data protection compliance when deploying artificial intelligence. In its foreword to the guidance, the ICO flags that the underlying data protection questions for even the most complex AI project are much the same as with any new project that involves the processing or personal data. Whilst it recognises that there are certain aspects of data protection compliance that are more challenging when seeking to implement AI (e.g. data minimisation, transparency and individual rights), the message from the ICO is that these challenges should be	Guidance	



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
	surmountable provided that data protection is considered at an early stage.		
UK ICO and Hong Kong's Privacy Commissioner for Personal Data sign MoU	<p>Hong Kong's Privacy Commissioner for Personal Data ("PCPD") and the UK ICO signed a Memorandum of Understanding on 29 July 2020 (the "MoU") as a means of facilitating greater cooperation between Hong Kong and the UK on the protection of personal data in their respective jurisdictions.</p> <p>Under the MoU each party has a commitment to:</p> <ul style="list-style-type: none"> • deliver the regulatory cooperation required to protect fundamental rights of citizens; • cooperate on matters concerning enforcement of data protection and privacy laws; • update the other on developments concerning the MoU; and • collaborate on joint investigations and enforcement actions. <p>The MoU provides that the parties may achieve these commitments by implementing a number of measures, which include exchanging information, experience and knowledge on data protection policies, artificial intelligence governance frameworks and ethics and by collaborating on research projects.</p>	<p>Press release</p> <p>MoU</p>	
Home Office issues guidance relating to national security certificates	<p>The Home Office has published guidance which provides data controllers with information on the process for applying for national security certificates under the Data Protection Act 2018 (the "DPA"). Amongst other things, the guidance notes that a national security certificate is not a pre-requisite to reliance on the national security exemption under the DPA (i.e. that certain processing is exempt from the provisions of the data protection legislation) and that obtaining a certificate is designed to give controllers greater legal certainty as to whether national security is engaged for certain data processing activities. The guidance provides that when determining whether a national security certificate would be beneficial, a controller should consider the volume and frequency of data being processed as well as other complexities which may be clarified by the certificate. The</p>	Guidance	



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
	guidance also provides information on amending and revoking a certificate.		
European Consumer Organisation publishes report on GDPR's two-year anniversary	<p>The European Consumer Organisation ("BEUC") has published a report on the effectiveness of GDPR, the General Data Protection Regulation in protecting consumer rights. The report highlights existing problems with the application of the GDPR to the consumer industry, particularly the lack of harmonised procedures to deal with cross-border issues as well as criticising the slow progress of data protection proceedings.</p> <p>In order to address these shortcomings, BEUC has made a number of recommendations, including for example requesting the European Data Protection Board to establish a basic framework for a common administrative complaints handling procedure to handle cross-border complaints.</p>	Report	

Main Menu



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
Automated driving	The Department for Transport has launched a consultation on the newly announced Automated Lane Keeping System which could see a system for automated driving at low speeds be implemented by spring 2021. The consultation seeks views on the role of the driver and rules on the use of the system, and whether vehicles using the system should be termed as automated vehicles, which would make the technology provider responsible for the vehicle safety. Consultation closes 27 October 2020.	Consultation	
EU consultation on changes to EU eIDAS regulation	The European Commission has launched a public consultation on the revision of Regulation (EU) No 910/2014, eIDAS , in order to amend the rules on electronic identification and trust services for electronic transactions in the internal market. Consultation closes on 2 October 2020.	Consultation	
EU assessment for AI legal requirements	The European Commission has launched an initial impact assessment on proposals for legal requirements for artificial intelligence. It follows on from its February 2020 White Paper on AI and outlines possible scenarios for regulating AI in Europe. Consultation closes 10 September 2020, with the proposal set to follow in the first quarter of 2021.	Assessment	
ICO guidance on AI and data protection	The ICO , working with the Alan Turing Institute , has released guidance on best practice and technical measures that organisations can use to mitigate the risks caused by the use of AI. Part 3 of the Guidance is aimed at senior executives and provides an outline of the organisational roles behind providing explanations to 'decision recipients', reviewing the policies and procedures, together with the documentation that can help ensure an organisation is able to provide appropriate explanations. It anticipates that senior management have overall responsibility for ensuring appropriate explanations are given, whilst compliance teams seek to ensure that	ICO guidance	



Immediate impact



Impact in the near future



On the horizon

Development	Summary	Supporting information	Impact
	<p>AI development and deployment meets internal policies and external regulatory requirements, based on appropriate information and assurances from AI product managers.</p> <p>Where AI solutions (or significant parts of such solutions) are bought or licensed-in, the Guidance is clear that the deploying organisation as the data controller "<i>[has] the primary responsibility for ensuring that the AI system you use is capable of producing an appropriate explanation for the decision recipient</i>".</p>		
Age appropriate design	<p>The ICO has published a statement issuing the Age Appropriate Design Code. The statement confirmed that it had completed the parliamentary process and that the Code will come into force on 2 September 2020. The Code will then have a transition period of 12 months to allow online service providers time to ensure that they will be compliant.</p>	ICO statement	

Main Menu



Immediate impact



Impact in the near future



On the horizon

For further information, please contact:



Simon Crossley, Partner
Co-Head of Global Commercial

T: +44 122 344 3850

M: +44 7785 907 024

simoncrossley@eversheds-sutherland.com

eversheds-sutherland.com

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